

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 23, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHLEEN C.,¹

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,²

Defendant.

No. 4:21-CV-05035-ACE

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING FOR
ADDITIONAL PROCEEDINGS

ECF Nos. 15, 19

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 15, 19. Attorney Chad Hatfield represents Kathleen C. (Plaintiff); Special Assistant United States Attorney Jeffrey E. Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and

¹To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
2 42 U.S.C. § 405(g).

3 **JURISDICTION**

4 Plaintiff protectively filed an application for Supplemental Security Income
5 on August 30, 2018, alleging disability since June 1, 2012. Tr. 15, 74, 157-76.
6 The applications were denied initially and upon reconsideration. Tr. 94-98, 102-
7 05. Administrative Law Judge (ALJ) Stewart Stallings held a hearing on June 18,
8 2020. Tr. 15, 30-63. The ALJ issued an unfavorable decision on September 2,
9 2020. Tr. 12-29. Plaintiff requested review by the Appeals Council and the
10 Appeals Council denied the request for review on January 5, 2021. Tr. 1-6. The
11 ALJ's September 2020 decision became the final decision of the Commissioner,
12 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
13 filed this action for judicial review on March 11, 2021. ECF No. 1.

14 **STANDARD OF REVIEW**

15 The ALJ is tasked with "determining credibility, resolving conflicts in
16 medical testimony, and resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035,
17 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
18 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
19 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
20 only if it is not supported by substantial evidence or if it is based on legal error.
21 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
22 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
23 1098. Put another way, substantial evidence "is such relevant evidence as a
24 reasonable mind might accept as adequate to support a conclusion." *Richardson v.*
25 *Perales*, 402 U.S. 389, 401 (1971), (quoting *Consolidated Edison Co. v. NLRB*,
26 305 U.S. 197, 229 (1938)). If the evidence is susceptible to more than one rational
27 interpretation, the Court may not substitute its judgment for that of the ALJ.
28 *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595,

599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Sec'y of Health and Hum. Services*, 839 F.2d 432, 433 (9th Cir. 1988).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant bears the burden of establishing a prima facie case of disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) that Plaintiff can perform other substantial gainful activity and (2) that a significant number of jobs exist in the national economy which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir. 1984); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a claimant cannot make an adjustment to other work, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

ADMINISTRATIVE FINDINGS

On September 2, 2020 the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act. Tr. 12-29.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since August 30, 2018, the date the application was filed. Tr. 17.

1 At step two, the ALJ determined Plaintiff had the following medically
2 determinable impairments: fibromyalgia/chronic pain syndrome, migraines, lumbar
3 degenerative disc disease, peripheral neuropathy, and a depressive disorder. *Id.*

4 At step three, the ALJ found Plaintiff did not have an impairment or
5 combination of impairments that met or medically equaled the severity of one of
6 the listed impairments. Tr. 18.

7 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
8 that she could perform light work, with the following nonexertional limitations:

9 [Plaintiff] would need the ability to alternate between sitting and
10 standing at will approximately every thirty minutes for about 5
11 minutes while remaining at the workstation. She could never climb
12 ladders, ropes, or scaffolds; occasionally climb ramps and stairs; and
13 occasionally stoop, crouch, kneel and crawl. She should avoid
14 extreme cold, moving dangerous machinery, and unprotected heights.
15 She would need low stress work (e.g., no production pace, conveyor
16 belt-type work). She would need a predictable work environment
17 with occasional simple workplace changes and work that involves no
18 more than brief superficial interaction with the public, coworkers, and
19 supervisor[s]. During any training period, additional interaction with
20 supervisors and coworkers is acceptable.

21 Tr. 19-20.

22 At step four, the ALJ found that Plaintiff was unable to perform past
23 relevant work. Tr. 23.

24 At step five, the ALJ found that, based on the testimony of the vocational
25 expert, and considering Plaintiff's age, education, work experience, and RFC,
26 Plaintiff could perform jobs that existed in significant numbers in the national
27 economy, including the jobs of: inspector and hand packager; small products
28 assembler; and garment sorter. Tr. 23-24.

The ALJ thus concluded Plaintiff was not under a disability within the
meaning of the Social Security Act at any time from the date her application was
filed through the date of the decision. Tr. 25.

ISSUES

Plaintiff seeks judicial review of the Commissioner’s final decision denying her disability insurance benefits under Title XVI of the Social Security Act. The question presented is whether substantial evidence supports the ALJ’s decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff raises the following issues for review: (1) whether the ALJ conducted a proper step-three analysis; (2) whether the ALJ properly considered Plaintiff’s symptom claims; and (3) whether the ALJ conducted a proper step-five analysis. ECF No. 15 at 7.

DISCUSSION

A. Step Three

Plaintiff argues the ALJ failed to properly consider listing 1.04A, failed to discuss listing 14.09D, summarily concluded that Plaintiff did not meet a listed impairment, and failed to consider the combined effects of Plaintiff’s impairments. ECF No. 15 at 9-14.

At step three of the sequential evaluation process, the ALJ considers whether one or more of the claimant’s impairments meets or equals an impairment listed in Appendix 1 to Subpart P of the regulations. 20 C.F.R. § 416.920(a)(4)(iii). Each Listing sets forth the “symptoms, signs, and laboratory findings” which must be established for a claimant’s impairment to meet the Listing. *Tackett*, 180 F.3d at 1099. If a claimant meets or equals a Listing, the claimant is considered disabled without further inquiry. 20 C.F.R. § 416.920(d).

“To *meet* a listed impairment, a claimant must establish that he or she meets each characteristic of a listed impairment relevant to his or her claim.” *Tackett*, 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 416.925(d). “To *equal* a listed impairment, a claimant must establish symptoms, signs and laboratory findings ‘at least equal in severity and duration’ to the characteristics of a relevant listed impairment” *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting

20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a). “If a claimant suffers from multiple impairments and none of them individually meets or equals a listed impairment, the collective symptoms, signs and laboratory findings of all of the claimant’s impairments will be evaluated to determine whether they meet or equal the characteristics of any relevant listed impairment.” *Id.* However, “[m]edical equivalence must be based on medical findings,” and “[a] generalized assertion of functional problems is not enough to establish disability at step three.” *Id.* at 1100 (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a).

“An ALJ must evaluate the relevant evidence before concluding that a claimant’s impairments do not meet or equal a listed impairment. A boilerplate finding is insufficient to support a conclusion that a claimant’s impairment does not [meet or equal a listing].” *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001). However, the ALJ is not required to state why a claimant fails to satisfy every section of the listings if the ALJ adequately evaluates the evidence; and while the ALJ must discuss and evaluate the evidence that supports the ALJ’s conclusions, the ALJ need not do so under any particular heading. *See Gonzalez v. Sullivan*, 914 F.2d 1197, 1200-01 (9th Cir. 1990); *Lewis*, 236 F.3d at 513. Additionally, “[a]n adjudicator’s articulation of the reason(s) why the individual is or is not disabled at a later step in the sequential evaluation process will provide [a] rationale that is sufficient for a subsequent reviewer or court to determine the basis for the finding about medical equivalence at step 3.” Social Security Ruling (SSR) 17-2P, 2017 WL 3928306, at *4 (effective March 27, 2017).

Here, the ALJ found Plaintiff’s impairments, considered singly and in combination, did not meet or equal the criteria of any listed impairment. Tr. 18. The ALJ did not discuss the criteria of any listing, but noted he considered “all of the listings . . . paying particular attention to Listing 1.02 (Major dysfunction of a joint(s) due to any cause), Listing 1.04 (Disorders of the Spine), Listing 11.02 (epilepsy) and Listing 11.14 (peripheral neuropathy). *Id.* The ALJ concluded “the

1 medical evidence does not document listing-level severity” and noted “no
2 acceptable medical source had mentioned findings equivalent in severity to the
3 criteria of any listed impairments, individually or in combination.” *Id.*

4 Plaintiff contends the ALJ erred by failing to properly consider listing 1.04A
5 because there is evidence Plaintiff met the requirements for the listing, which the
6 ALJ did not discuss; and that the ALJ erred in failing to consider listing 14.09D,
7 for fibromyalgia, and failed to assess the combined effects of Plaintiff’s
8 impairments. ECF No. 15 at 11-14. Defendant contends the ALJ reasonably
9 concluded that Plaintiff’s impairments were not per se disabling, he explained his
10 conclusions elsewhere in the decision, and Plaintiff has failed to show the ALJ
11 erred. ECF No. 19 at 10-14.

12 The Court finds the ALJ did not provide adequate summary or evaluation of
13 relevant evidence at step three or elsewhere in the decision, and such analysis is
14 necessary to determine whether Plaintiff met or equaled a listing. While the ALJ
15 briefly discussed Plaintiff’s back impairment elsewhere in the decision, he failed to
16 discuss medical evidence relevant to the listing. Tr. 21.

17 Listing 1.04A,³ concerns:

18
19 Disorders of the Spine (e.g., herniated nucleus pulposus, spinal
20 arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet
21 arthritis, vertebral fracture), resulting in comprise of a nerve root . . . or the
spinal cord. With:

22 A. Evidence of nerve root compression characterized by neuro-anatomic
23 distribution of pain, limitation of motion of the spine, motor-loss (atrophy
24 with associated muscle weakness or muscle weakness) accompanied by

25
26 ³ As of April 2, 2021, listing 1.04 was removed and replaced with Listing
27 1.15, 1.16. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1 (April 2, 2021). The Court
28 applies the listing that was in effect at the time of the ALJ’s decision.

1 sensory or reflex loss, and if there is involvement of the lower back,
2 positive straight-leg raise test (sitting and supine);

3 20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.04A.

4 The ALJ did not discuss evidence relevant to the listing at step three. Tr. 18.
5 Elsewhere in the decision, the ALJ briefly discusses Plaintiff's physical
6 impairments, including her back impairments. Tr. 21. An ALJ must, however,
7 consider all of the relevant evidence in the record and may not point to only those
8 portions of the records that bolster his findings. *See, e.g., Holohan v. Massanari*,
9 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding that an ALJ cannot selectively
10 rely on some entries in plaintiff's records while ignoring others). Here, the ALJ
11 noted "lumbar imaging has shown only mild to moderate degenerative disc
12 disease" and acknowledged "an October 2015 nerve conduction study and EMG
13 study evidence[d] lumbar L5 radiculopathy." Tr. 21. The ALJ then concluded that
14 Plaintiff has "consistently presented . . . with full range of motion of the upper and
15 lower extremities, no motor or sensory deficits, 5/5 strength throughout, intact
16 cranial nerves, a normal gait and station, negative straight leg raises, etc." *Id.*

17 The Court finds the ALJ's analysis insufficient. As Plaintiff points out,
18 records show a history of chronic, progressive back pain radiating to both legs with
19 weakness in the lower extremities, objective findings of impaired sensation upon
20 nerve conduction study/EMG testing, and positive straight leg raise testing; and
21 MRI findings include a mild disc bulge at L4-L5 that narrows both lateral recess
22 contacting the bilateral L5 nerve roots, moderate bilateral foraminal narrowing at
23 L4-L5, and moderate bilateral degenerative facet disease at L4-L5. ECF No. 15 at
24 11-13; *see e.g.*, Tr. 380, 383, 385-86, 352, 353, 434, 759, 771, 813. Records also
25 show reduced range of motion and tenderness of the lumbar spine, antalgic gait,
26 and other relevant findings that are inconsistent with the ALJ's summary of the
27 medical evidence. *See e.g.*, Tr. 380, 352, 353, 759, 771, 813.

1 The ALJ cited to evidence that tended to support his conclusions when
2 review of the record as a whole shows more mixed findings, including evidence
3 the ALJ did not discuss that directly pertains to the listing, such as the MRI
4 findings and evidence of positive straight leg raise testing. *See e.g.*, Tr. 302, 386,
5 549-50. Additionally, in support of the conclusion that records show generally
6 normal findings, the ALJ cited primarily to mental health or other appointments
7 unrelated to Plaintiff's back issues and skipped records related to her back issues,
8 resulting in a mischaracterization of the record. Tr. 21. For example, to support
9 unremarkable physical exam findings the ALJ cites to multiple mental health visits
10 and office and ER visits for unrelated issues, including citation two times in the
11 same string of cites to an ER visit for a tooth abscess/tooth pain. Tr. 21 (citing
12 *e.g.*, Tr. 271, 275, 281, 307, 321, 357, 363, 371, 816, 861, 940-41). The ALJ does
13 not cite to relevant findings within the same set(s) of records that support listing
14 level severity, for example, bilateral positive straight leg raise, musculoskeletal
15 tenderness and pain, decreased lumbar range of motion, and lower extremity
16 weakness. *See, e.g.*, Tr. 353, 759. Notably, some of the cites the ALJ lists to
17 support his conclusion Plaintiff has consistently presented with normal findings
18 include relevant abnormal findings including antalgic gait, evidence of
19 radiculopathy on EMG testing, musculoskeletal tenderness and pain upon lumbar
20 range of motion testing, along with comments from a provider that imaging
21 showed "potential impingement of exiting left L4 nerve root from [neural
22 foraminal] stenosis," and repeat assessment of chronic pain related to degenerative
23 changes of the low back. *See e.g.*, Tr. 291, 339-40, 353, 386, 402, 425-26, 792.

24 Additionally, the ALJ selectively cites Plaintiff's reporting of pain level. In
25 January 2017, for example, she reported pain "4/10 now, 6/10 on average, 8/10 at
26 the worst." Tr. 380. While the ALJ found that Plaintiff reported "mild to
27 moderate 3-4/10 pain since 2018," Tr. 22, records from February 2019, for
28

1 example, show she reported pain at 6/10 that day with an average of 7/10 that
2 week. Tr. 921.

3 The ALJ's conclusion that the medical evidence does not document listing-
4 level severity is not supported by substantial evidence. The ALJ failed to
5 adequately evaluate relevant evidence or provide sufficient rational for the Court to
6 determine the basis for step three findings in relation to at step three or elsewhere
7 in the decision.

8 Plaintiff contends the ALJ also erred in failing to mention listing 14.09D in
9 accordance with SSR 12-2 when assessing Plaintiff's fibromyalgia, and that he
10 erred in failing to properly consider the combined effects of her impairments. ECF
11 No. 15 at 14. The ALJ is instructed to reconsider all medical evidence and make
12 additional step three findings as warranted.

13 Upon remand, the ALJ is instructed to reevaluate all medical evidence with
14 the assistance of medical expert testimony, reconsider whether Plaintiff's
15 impairments meet or equal a listing and to set forth an analysis of the relevant
16 listing(s). The ALJ is instructed to further develop the record, if necessary, with a
17 consultative examination.

18 **B. Symptom Claims**

19 Plaintiff contends the ALJ erred by improperly rejecting Plaintiff's
20 subjective complaints. ECF No. 15 at 14-20.

21 It is the province of the ALJ to make determinations regarding a claimant's
22 subjective statements. *Andrews*, 53 F.3d at 1039. However, the ALJ's findings
23 must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229,
24 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an
25 underlying medical impairment, the ALJ may not discredit testimony as to the
26 severity of an impairment merely because it is unsupported by medical evidence.
27 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence
28 of malingering, the ALJ's reasons for rejecting the claimant's testimony must be

1 “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
2 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “General findings are
3 insufficient: rather the ALJ must identify what testimony is not credible and what
4 evidence undermines the claimant’s complaints.” *Lester* at 834; *Dodrill v. Shalala*,
5 12 F.3d 915, 918 (9th Cir. 1993).

6 Here, the ALJ concluded Plaintiff’s medically determinable impairments
7 could reasonably be expected to cause the alleged symptoms; however, Plaintiff’s
8 statements concerning the intensity, persistence, and limiting effects of those
9 symptoms were not entirely consistent with the medical evidence and other
10 evidence in the record. Tr. 21.

11 *1. Inconsistent with Objective Medical Evidence*

12 The ALJ found Plaintiff’s allegations were not consistent with objective
13 findings. Tr. 21-22. An ALJ may not discredit a claimant’s symptom testimony
14 and deny benefits solely because the degree of the symptoms alleged is not
15 supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 856
16 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v.*
17 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*, 400 F.3d at 680. However, the
18 objective medical evidence is a relevant factor, along with the medical source’s
19 information about the claimant’s pain or other symptoms, in determining the
20 severity of a claimant’s symptoms and their disabling effects. *Rollins*, 261 F.3d at
21 857; 20 C.F.R. § 404.1529(c)(2).

22 As discussed in relation to step three, *supra*, the ALJ failed to discuss
23 relevant medical evidence and selectively cited evidence that tended to support
24 nondisability. The ALJ’s conclusion that Plaintiff’s allegations were not consistent
25 with objective findings is therefore also not legally sufficient.

26 *2. Other reasons*

27 The ALJ gave other reasons to discount Plaintiff’s subjective symptom
28 claims. Having determined a remand is necessary to readdress the medical

1 evidence at step three, any reevaluation must necessarily entail a reassessment of
2 Plaintiff's subjective symptoms claims. Thus, the Court declines to further address
3 this issue, and on remand the ALJ must also carefully reevaluate Plaintiff's
4 symptom claims in the context of the entire record.

5 C. Step Five

6 Plaintiff contends the ALJ erred by relying on an incomplete hypothetical to
7 the vocational expert. ECF No. 15 at 20. As the case is being remanded for the
8 ALJ to reconsider the medical evidence at step three and Plaintiff's subjective
9 complaints, the ALJ is also instructed to perform the five-step analysis anew,
10 including reconsidering the step-five analysis.

11 CONCLUSION

12 The ALJ's decision is not supported by substantial evidence. Plaintiff
13 argues the ALJ's decision should be reversed and remanded for the payment of
14 benefits. The Court has the discretion to remand the case for additional evidence
15 and findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court may award
16 benefits if the record is fully developed and further administrative proceedings
17 would serve no useful purpose. *Id.* Remand is appropriate when additional
18 administrative proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d
19 759, 763 (9th Cir. 1989). In this case, the Court finds that further development is
20 necessary for a proper determination to be made.

21 Upon remand, the ALJ is instructed to reevaluate all medical evidence with
22 the assistance of medical expert testimony, reconsidering whether Plaintiff's
23 impairments meet or equal a listing and setting forth an analysis of the relevant
24 listing(s). The ALJ shall reconsider Plaintiff's subjective complaints and make
25 new findings on each of the five steps in the sequential process. The ALJ should
26 order a consultative examination, if necessary, and is to take into consideration any
27 other evidence or testimony relevant to Plaintiff's disability claim.

28 Accordingly, **IT IS ORDERED:**

1 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
2 **GRANTED.**

3 2. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
4 **DENIED.**

5 3. The matter is **REMANDED** to the Commissioner for additional
6 proceedings consistent with this Order.

7 4. An application for attorney fees may be filed by separate motion.
8 The District Court Executive is directed to file this Order and provide a copy
9 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
10 the file shall be **CLOSED.**

11 DATED January 23, 2023.



A handwritten signature in blue ink that reads "Alexander C. Ekstrom".

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE